

THE RISE AND FALL OF THE PROXY ACCESS IDEA: A  
NARRATIVE

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Every person involved in the creation or exercise of any discipline tends to strive toward absolutes. Is the idea of proxy access a step closer to immaculate corporate governance? According to the most recent actions of its introducers, it is not—or at least not yet.

In mentioning some of the events and ruminations on proxy access that have been present in the previous seventy years, I should not and cannot argue about the potential and profound impact proxy access might be having on corporate America, especially with regard to its current activist-unfriendly form introduced by the SEC. However, as it is a matter of political economy, my concern is related to a sudden decision announced by the SEC on October 4, 2010.<sup>1</sup> It undermined the efforts and gradual development of an idea that, at first sight, appears to have insignificant real drawbacks for its opponents and at least a few positive contingent disciplinary effects on the directors of a public company. The announced stay on implementation of Rule 14a-11 could either be interpreted as vivid insecurity and doubt casted about its own “baby” by the SEC, or maybe as something else.

The first whispers of the proxy access idea can be traced back to the early forties of the past century, when staff members of the SEC proposed shareholder access to companies’ proxy materials.<sup>2</sup> Then, a similar suggestion occurred in the late seventies.<sup>3</sup> Another attempt to introduce proxy access was launched in 2003, in light of, and as a consequence of the Enron-WorldCom corporate failure: this proposal had envisaged thresholds that were considerably higher than the most

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<sup>1</sup> Bus. Roundtable & Chamber of Comm. of U.S., Securities Act Release No. 9149, Exchange Act Release No. 63,031, Investment Company Act Release No. 29,456 (Oct. 4, 2010).

<sup>2</sup> 17 C.F.R. pt. 239 (1942).

<sup>3</sup> 42 Fed. Reg. 44,860 (Sept. 7, 1977); 42 Fed. Reg. 23,901 (May 11, 1977).

recently adopted rule.<sup>4</sup> However, similarly to the last month's events, two traditionally influential interest groups (the aforementioned opponents of proxy access), the Business Roundtable and the U.S. Chamber of Commerce, strongly lobbied against this rule. After the *AFSCME* case,<sup>5</sup> in which the Delaware Supreme Court clearly denounced the passivity of the SEC in relation to proxy access, the Commission amended the rule by permitting corporations to exclude any proposal that "relates to an election for membership on the company's board of directors or analogous governing body."<sup>6</sup> However, shortly after the election of President Obama, the SEC once again tackled the proxy access idea by providing a more structured alternative for those provisions.<sup>7</sup> Finally, after introducing the Dodd-Frank bill, it became clear that the SEC had not only obtained the formal authority to issue shareholder proxy access rules, but it also had been given an unambiguous sign by Congress to make this rule.<sup>8</sup> The Rule was adopted on August 25, 2010 and was planned to be effective from November 15, 2010.<sup>9</sup> It seemed that nothing would stop the proxy access rule from becoming the reality of corporate America until the Business Roundtable and the U.S. Chamber of Commerce filed a complaint in the D.C. Circuit Court of Appeals, triggering a sudden, unprecedented act by the SEC.<sup>10</sup> This event would not have attracted much attention if it had not triggered the SEC to announce a stay on implementation of the proxy access rule on October 4, 2010. A relevant practical implication of this event was that proxy access would not be effective for the 2011 proxy season.

Along with the described events, academic papers have been published in abundance on the proxy access issue. For example, Marcel Kahan and Edward Rock argue in their most recent working paper that proxy access, especially in its most recent form (3% ownership and three years holding threshold) is of little importance and practical use in comparison to other available instruments in corporate governance.<sup>11</sup> Therefore, its impact (which is under the current proposal largely constrained) cannot serve as an excuse to exercise the stay remedy that has never been used before.

The behavior of the Business Roundtable and Chamber of Commerce in the October 2010 event was in accordance with its inherent duty of protecting the

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<sup>4</sup> 17 C.F.R. pts. 240, 249, and 274 (2003).

<sup>5</sup> *CA, Inc. v. AFSCME Emps. Pens. Plan*, 953 A.2d 227 (Del. 2008).

<sup>6</sup> 17 C.F.R. pt. 240 (2007).

<sup>7</sup> See 17 C.F.R. pts. 200, 232, 240, 249, and 274 (2009).

<sup>8</sup> See Pub. L. No. 111-203, § 971, 124 Stat. 1376, 1915 (2010) (to be codified at 15 U.S.C. § 78o-7).

<sup>9</sup> 17 C.F.R. pts. 200, 232, 240, and 249 (2010).

<sup>10</sup> *Bus. Roundtable v. SEC*, No. 10-1305 (D.C. Cir., filed Sept. 29, 2010).

<sup>11</sup> Marcel Kahan & Edward B. Rock, *The Insignificance of Proxy Access* (U. Pa., Inst. for Law & Econ. Research Paper No. 10-26; N.Y.U. Law and Econ. Research Paper No. 10-51), available at <http://ssrn.com/abstract=1695682>.

interest of management; however, the stay imposed by the SEC is entirely unexpected. So, what else is there to consider that might go beyond academic debates in the proxy access story?

Taking into account the recent U.S. Senate elections and Wall Street's criticism of President Obama and the Democrats, a viable reason for this sudden and unexpected decision of the SEC may be evident at last: in order to appease Wall Street and therefore gain political points and support, placing a stay on proxy access seemed to be an opportune political concession at that point.

By just broadly looking at the events surrounding proxy access from its beginnings until today, it seems that history repeats itself. In a corporate world that already has certain instruments aimed at fixing flaws in corporate governance, proxy access is given a minor role and has been subject to political trade, rather than corporate governance enhancement.

To test whether the minor impact argument is true or not, we will have to wait for another proxy season, unless the SEC (or the D.C. Circuit Court of Appeals – which is fairly unlikely) decides, once again, to regard proxy access as insignificant and thus, yet again, not allow the testing of this idea in the U.S. corporate environment.